Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of	)	
	)	
Comcast Corporation and Time Warner Cable Inc.,	)	MB Docket No. 14-57
Charter Communications Inc. and SpinCo,	)	
	)	
for Consent to Assign Licenses	)	
or Transfer Control of Licensees	)	
	)	
Applications of	)	
	)	
AT&T, Inc. and DIRECTV,	)	MB Docket No. 14-90
	)	
for Consent to Assign Licenses	)	
or Transfer Control of Licensees	)	

EMERGENCY REQUEST FOR STAY OF MEDIA BUREAU ORDER AND ASSOCIATED MODIFIED PROTECTIVE ORDERS

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Dated: October 14, 2014

SUMMARY

Federal law and Commission precedent respect the rights of satellite-delivered programming networks and television broadcasters to maintain the strict confidentiality of the terms and conditions of their affiliation, distribution, and retransmission consent agreements with content distributors. Never before has the Commission required that these agreements, and highly sensitive information relating to the negotiation of those agreements, categorically be made available for public inspection in connection with a merger review proceeding.

The Orders do not justify the Bureau's departure from this longstanding policy and practice. Pursuant to the Orders, members of the public may access unredacted copies of highly sensitive carriage agreements, and information relating to the negotiation of those agreements, between the Content Companies (and other programmers and broadcasters)—which are not parties to the transactions under review—and the applicants in the captioned proceedings. The Orders were promulgated in the face of both substantial public comment opposing disclosure and the Commission's historical recognition that disclosure of these programming contracts would cause substantial competitive harm.

For the reasons explained below and in the Content Companies' Application for Review, being filed concurrently herewith and attached hereto,[1] the Orders are contrary to federal law and the Commission's Rules, precedent, and longstanding policy and practice. As a result, the Orders risk competitive harm in the video program distribution marketplace and otherwise disserve the public interest. In particular:

[1] *See* Application for Review (Exhibit 1).

- The Bureau lacked authority to issue the Orders.
- The measures adopted in the Orders are contrary to the Commission's prior treatment of highly sensitive confidential information in merger transactions.
- The Orders violate the Trade Secrets Act, as they fail to offer a "persuasive showing" that the Carriage Agreements should be placed in the record.
- The Orders will cause substantial harm to the Content Companies and other programmers and broadcasters.

The Content Companies therefore respectfully request that the Commission stay the Orders in order to prevent the public disclosure of highly sensitive Carriage Agreements and related materials pending its consideration of the Application for Review. A stay is warranted because the Content Companies are likely to prevail on the merits and will suffer irreparable harm in the absence of a stay. No interested party will be harmed by a stay while the Application for Review is under consideration, and the public interest favors a stay. A stay also is consistent with the Orders' mandates that, where an objection to disclosure of Highly Confidential Information has been filed, access to that information will not be provided until the objection is finally resolved by the Commission and, if appropriate, a court of competent jurisdiction.

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I. INTRODUCTION

CBS Corporation, Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc., together and respectively on behalf of their affiliated businesses (collectively, the "Content Companies"), hereby request an immediate stay of the Media Bureau's (the "Bureau") Order, DA 14-1463, and associated Modified Joint Protective Orders, DA 14-1464 (14-57) and DA 14-1465 (14-90), released concurrently in the captioned proceedings on October 7, 2014,[2] until the Commission acts on the Content Companies' Application for Review of the Orders (the "Application for Review").

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[2] *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, MB Docket Nos. (continued…)

Federal law and Commission precedent respect the rights of satellite-delivered programming networks and television broadcasters to maintain the strict confidentiality of the terms and conditions of their affiliation, distribution, and retransmission consent agreements (collectively, "Carriage Agreements") with multi-channel video programming distributors ("MVPDs"). As the Bureau recognized, the "key terms" of these contracts "have historically been treated as especially sensitive from a competitive standpoint and involve highly confidential information."[3] Never before has the Commission required that Carriage Agreements, and highly sensitive information relating to the negotiation of those Agreements, categorically be made available for public inspection in connection with a merger review proceeding.

The Orders—which provide public access to unredacted copies of highly sensitive Carriage Agreements and related negotiation materials between the Content Companies and the applicants in the captioned proceedings (the "Transaction Parties")—do not justify the Bureau's departure from this longstanding policy and practice. The Orders were promulgated in the face of both substantial public comment opposing disclosure and the Commission's historical

14-57, 14-90, DA 14-1463 (Oct. 7, 2014) (the "Order"); *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorization*, Modified Joint Protective Order, MB Docket No. 14-57, DA 14-1464 (Oct. 7, 2014) ("Modified Joint Protective Order 14-57"); *In the Matter of Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorization*, Modified Joint Protective Order, MB Docket No. 14-90, DA 14-1465 (Oct. 7, 2014) ("Modified Joint Protective Order 14-90"). Because Modified Joint Protective Order 14-57 and Modified Joint Protective Order 14-90 are substantively identical, they are referred to collectively as the "Modified Joint Protective Orders." The Order and the Modified Joint Protective Orders are collectively referred to as the "Orders."

[3] Order, ¶ 2.

recognition that "disclosure of programming contracts between [MVPDs] and programmers can result in substantial competitive harm to the information provider."[4]

The Content Companies therefore respectfully request that the Commission stay the Orders in order to prevent the public disclosure of highly sensitive Carriage Agreements and related materials while the Commission considers the Application for Review. A stay is warranted because the Content Companies are likely to prevail on the merits and will suffer irreparable harm in the absence of a stay.[5] No interested party will be harmed by a stay while the Application for Review is under consideration, and the public interest favors a stay.[6] A stay also is consistent with the Bureau's mandate that, where an objection to disclosure of Highly Confidential Information has been filed, access to that information will not be provided until the objection is resolved by the Commission and, if appropriate, a court of competent jurisdiction.[7]

II. BACKGROUND

In connection with its review of the captioned transactions, the Media Bureau issued Information and Data Requests ("IDRs") to Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("TWC"), and Charter Communications Inc. ("Charter") (in MB Docket 14-57 on August 21, 2014), and to AT&T, Inc. ("AT&T") and DIRECTV (in MB Docket 14-90 on September 9, 2014).[8] As the Bureau acknowledged, its IDRs "seek, among other things, certain

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[4] *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, FCC 98-184, 13 FCC Rcd. 24816, 24852 (rel. Aug. 4, 1998) (the "1998 Policy Statement").

[5] *See Wash. Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[6] *See Washington Metro. Area Transit*, 559 F.2d at 843.

[7] Modified Joint Protective Orders, ¶ 8; *see also* Order, ¶ 10.

[8] *See* Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corp. (continued…)

types of contracts (*e.g.*, programming and retransmission consent agreements) whose key terms have historically been treated as especially sensitive from a competitive standpoint and involve highly confidential information."[9]

Public disclosure of highly sensitive information contained in their Carriage Agreements would cause irreparable harm to the Content Companies' businesses and to competition in the video distribution marketplace. Accordingly, the Content Companies and other programmers and broadcasters advised Commission staff of their concern that the Joint Protective Orders did not adequately protect the confidentiality of their Carriage Agreements or negotiation materials and thereby risked harm to the public interest.[10] Among other things, the Content Companies urged the Bureau to adopt the same approach that has been successfully implemented in other merger proceedings and review copies of the Carriage Agreements that have been provided to the Department of Justice. In the alternative, the Content Companies urged the Bureau to place in the record only those Carriage Agreements determined by the

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(Aug. 21, 2014), and Information and Data Request to Comcast Corporation; Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Steven Tepliz, Senior Vice President, Gov't Relations, Time Warner Cable Inc. (Aug. 21, 2014), and Information and Data Request to Time Warner Cable Inc.; Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Catherine Bohigian, Exec. Vice President, Gov't Affairs, Charter Commc'ns, Inc. (Aug. 21, 2014), and Information and Data Request to Charter Commc'ns, Inc.; Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Robert W. Quinn Jr., Senior Vice President - Fed. Regulatory & Chief Privacy Officer, AT&T Services, Inc. (Sept. 9, 2014), and AT&T Information and Discovery Requests; Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Stacy Fuller, Vice President, Regulatory Affairs, DIRECTV (Sept. 9, 2014), and DIRECTV Information and Discovery Requests.

[9] Order, ¶ 2.

[10] *See Media Bureau Seeks Comment on Issues Raised by Certain Programmers and Broadcasters Regarding the Production of Certain Documents in Comcast-Time Warner Cable-Charter and AT&T-DIRECTV Transaction Proceedings*, MB Docket Nos. 14-57, 14-90, DA 14-1383, at 1 (Sept. 23, 2014); *see also* Letter from Mace Rosenstein, Covington & Burling LLP, to Marlene H. Dortch, Secretary, Fed. Commc'ns Comm'n (Sept. 23, 2014).

Commission to be relevant to its consideration of the transactions, and to anonymize and redact sensitive information in any such materials placed in the record.[11]

In response, on September 23, 2014, the FCC sought public comment on the concerns raised by the Content Companies and other programmers and on the nature and extent of possible modifications to the Joint Protective Orders.[12] Twenty-six parties, filing either jointly or individually, opposed disclosure of Carriage Agreements.[13] Instead, commenters supported the Content Companies' position that the confidentiality of highly sensitive Carriage Agreements and related materials could be assured only by segregated review by Commission personnel at the Department of Justice or by anonymization and/or redaction of price and other confidential terms and conditions of any materials placed in the record of the Proceedings. By contrast, only three commenters supported public access to raw, unredacted Carriage Agreements—including the pricing materials—and related negotiation materials.[14]

On October 7, the Bureau issued the Orders. Modified Joint Protective Order 14-57 replaces the Joint Protective Order issued in MB Docket No. 14-57. Modified Joint

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[11] It is not accurate that—as a blog entry posted on the Commission's website suggested—the Content Companies took the "position that the contracts . . . with the [Transaction Parties] should not be received by the Commission." *See* Bill Lake, et al., *Transaction Reviews and the Public Interest*, The Official FCC Blog, at 1 (Oct. 7, 2014, 2:57 PM), *available at* http://www.fcc.gov/blog/transaction-reviews-and-public-interest (the "Transaction Reviews Blog Post").

[12] *Media Bureau Seeks Comment on Issues Raised by Certain Programmers and Broadcasters Regarding the Production of Certain Documents in Comcast-Time Warner Cable-Charter and AT&T-DIRECTV Transaction Proceedings*. MB Docket Nos. 14-57, 14-90, DA 14-1383, at 1 (Sept. 23, 2014); *see also id.*, Attach. 3 (DA-14-1383A4) & Attach. 4 (DA-14-1383A5).

[13] *See, e.g.*, Comments, filed by Content Companies, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); Comments, filed by Content Companies, MB Docket Nos. 14-57, 14-90 (Oct. 3, 2014).

[14] Comments, filed by Dish Network Corp., MB Docket Nos. 14-57, 14-90 (Sept. 26, 2014); Comments, filed by CenturyLink, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); Comments, filed by American Cable Association ("ACA"), MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014) ("ACA Comments").

Protective Order 14-90 replaces the Joint Protective Order issued in MB Docket No. 14-90. The Order sets forth the Bureau's rationale for issuing the Modified Protective Orders.

The Bureau agreed that Carriage Agreements and related negotiation materials "contain highly sensitive information that is central to the contracting parties' . . . business strategies, including, among other things, pricing and business terms."[15] Moreover, the Bureau acknowledged that because it currently is considering two major transactions, any decision to provide public access to Carriage Agreements would "make available a scope of highly sensitive information that is both uniquely broad and extremely detailed."[16]

The Orders nonetheless make publicly available unredacted copies of Carriage Agreements, negotiation materials relating to those Agreements, and other highly sensitive "Video Programming Confidential Information" ("VPCI").[17] Any "Outside Counsel of Record,"[18] any "Outside Consultant"[19] and certain other individuals[20] may access these materials

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[15] Order, ¶ 13.

[16] *Id.*

[17] "Video Programming Confidential Information" includes "an agreement, or any part thereof, for distribution of any video programming (including broadcast programming) carried by an Applicant's (i) MVPD service and/or (ii) OVD service; a detailed description of one or more provisions of such an agreement, including, but not limited to, price terms; and information relating to the negotiation of such an agreement." Modified Joint Protective Orders, ¶ 2.

[18] "Outside Counsel of Record" includes "attorney(s), firm(s) or attorneys, or sole practitioner(s), as the case may be, retained by a Participant in this proceeding, provided that such attorneys are not involved in Competitive Decision-Making." *Id.* A person is involved in "Competitive Decision-Making" if the "person's activities, association, or relationship with any of his clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party or with a Third Party Interest Holder." *Id.*

[19] "Outside Consultant" is defined to include "a consultant or expert retained for the purpose of assisting Outside Counsel or a Participant in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making." *Id.*

[20] These other individuals include employees of the Outside Counsel and Outside Consultants who are "paralegals or other employees of such Reviewing Party assisting them in this (continued…)

if they execute and file an Acknowledgment of Confidentiality at any point in time during the Commission's review.[21] These rolling acknowledgments are served on the Transaction Parties, but not on the Content Companies or other parties to these materials.[22] The Modified Joint Protective Orders afford the parties to these materials three days to object to any request for access made by Outside Counsel or Outside Consultants once they are posted to the Commission's website.[23] Further, although the Modified Joint Protective Orders prohibit printing or copying of VPCI, reviewing parties are not barred from copying taking notes or from transcribing the materials they review, including highly sensitive pricing information.[24]

The Orders provide significant protections to the Transaction Parties and little meaningful protection to the Content Companies, which are not parties to the transactions under review and did not ask for their highly sensitive information to be produced to the Commission. Specifically, under the Orders, the Content Companies and other programmers and broadcasters do not have the right to receive prior notice that their highly sensitive VPCI is to be made available for public inspection.[25] They are afforded no opportunity to determine—or even to consult regarding—which items of their proprietary information will be classified as VPCI and disclosed to the public. The Orders leave that responsibility to the sole discretion of the

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proceeding" or who are "employees of third-party contractors involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding." *Id.*, ¶¶ 7, 13.

[21] *Id.*, ¶¶ 7, 9.

[22] *Id.*, ¶ 7.

[23] *Id.*, ¶ 8.

[24] *Id.*, ¶ 10.

[25] The Transaction Parties are not required to notify programmers or broadcasters that they are submitting materials containing VPCI. They are only "urged" to do so. *Id.*, ¶ 8.

Transaction Parties,[26] which have expressed more interest in ensuring the prompt closing of their proposed transactions than protecting the Content Companies' highly sensitive information. And, although reviewing parties have the right to object that certain materials subject to a VPCI designation are *not* entitled to protection,[27] the Orders do not give programmers the reciprocal right to object that improperly designated materials should be subject to *heightened* protection.

In the three business days after the Bureau issued the Orders, nearly 200 acknowledgments were submitted from individuals requesting access to the Content Companies' highly sensitive confidential information by submitting Acknowledgements of Confidentiality under the Modified Joint Protective Orders. None of those requests provides any particularized showing explaining why the requesting individual needs to review highly sensitive documents produced by the Transaction Parties, or even which documents the requesting party intends to review. Further, many of the individuals who seek access to this information represent or are employees of distributors that do business with the Content Companies on a regular basis or trade associations that represent them.[28]

III. GRANT OF A STAY IS NECESSARY AND APPROPRIATE AND WILL SERVE THE PUBLIC INTEREST.

To obtain a stay, a petitioner must demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of the

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[26] *Id.*, ¶ 3 (a "Submitting Party *may* designate" material as Highly Confidential (emphasis added)); *id.*, ¶ 6 (determination of whether Highly Confidential document "contains information so sensitive that copying of it should be restricted" rests "in the reasonable judgment of the Submitting Party").

[27] *Id.*, ¶ 4.

[28] *See, e.g.*, Acknowledgments on behalf of the ACA, MB Docket No. 14-57 (Posted Oct. 9, 2014); Acknowledgments on behalf of DISH Network, MB Docket No. 14-57 (Posted Oct. 9, 2014).

stay.[29] As explained below, each of these requirements is satisfied here, and a stay is both appropriate and necessary to prevent the release of highly sensitive, proprietary commercial information, and the attendant risk of harm to competition and the public interest.[30]

The Bureau has failed even to review the VPCI itself to determine which, if any, materials are relevant to its review of the proposed transactions and therefore should be placed in the record. The Orders also failed to explain why compelled mass public disclosure of Carriage Agreements and related negotiation materials justifies the substantial risk of harm to the Content Companies and the public that will result from this disclosure. By contrast, no party will be harmed if the Orders are stayed, and there is no public benefit to allowing the Orders to remain in force at the risk of disclosure and possible dissemination of highly sensitive confidential information. The Commission therefore should stay the Orders.

A. The Content Companies Will Suffer Irreparable Harm In The Absence Of A Stay.

There is ample reason to believe that Carriage Agreements to which the Content Companies are parties and related negotiation information will become available to content distributors and the Content Companies' competitors. As the Bureau acknowledges, such a result would cause irreparable harm to the Content Companies and the competitive marketplace.

1. The Orders Fail To Adequately Protect The Content Companies' Confidential Information.

Misuse of the Content Companies' highly sensitive information will almost certainly occur because of at least three significant gaps in the Modified Joint Protective Orders. *First*, the heightened protections adopted in the Modified Joint Protective Orders apply only to

[29] *Wash. Metro. Area Transit*, 559 F.2d at 843; *Va. Petroleum Jobbers*, 259 F.2d at 925.

[30] *See Wash. Metro. Area Transit*, 559 F.2d at 843.

material that has been designated by the Transaction Parties as "Highly Confidential" and VCPI. But there is a substantial risk that the Content Companies' highly sensitive confidential information will be improperly designated or erroneously produced. The obligation to review, classify, and produce the Content Companies' highly sensitive confidential material rests exclusively with the Transaction Parties. Yet, under the Orders, the Transaction Parties "may"—but are not required to—ensure that materials are properly designated.[31] The Transaction Parties also are "urged"—but not required —to give the Content Companies advance notice that their confidential information is being produced.[32]

The Orders give the Transaction Parties little incentive to ensure that the Content Companies' proprietary interests are protected. The Transaction Parties previously have stated that "identifying and segregating certain types of materials for additional protection would be a burdensome and time-consuming process";[33] indeed, one of the Transaction Parties contends that performing the additional level of review necessary to isolate VPCI is "unworkable."[34] It is therefore not surprising that even the Bureau—by preemptively giving the Transaction Parties immunity for "fail[ing] to segregate documents containing VPCI in these proceedings" so long as they used "all reasonable efforts to identify and segregate" such documents—appears to

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[31] Modified Joint Protective Orders, ¶ 3.

[32] *Id.*, ¶ 8.

[33] Order, ¶ 3.

[34] Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corp. to Marlene H. Dortch, Secretary, Fed. Commc'ns Comm'n, MB Docket No. 14-57, at 3 (Sept. 26, 2014).

acknowledge that the Content Companies' most sensitive information is at risk of public disclosure.[35]

Second, even if materials have been properly designated, the Protective Orders fail to adequately control access to VPCI. Although the Orders purport to limit access to Carriage Agreements to Outside Counsel of Record and Outside Consultants (and their employees or agents) who are not currently engaged in Competitive Decision-Making, these individuals—just like in-house employees—act on behalf of their clients in a variety of negotiation settings, including by providing advice on rates and other highly sensitive proprietary terms and conditions. Further, it is not uncommon for such individuals to participate in the negotiation of distribution agreements on behalf of multiple clients that compete with or have distribution contracts with the Content Companies. The Orders ignore the significant substantive role these individuals play in Carriage Agreement negotiations.

Nor do the Orders take into account the marketplace reality that these individuals often transition from acting as outside agents to serving as employees of the Content Companies' competitors and distributors. In addition, the Orders ignore the possibility that an individual who is not currently engaged in Competitive Decision-Making—and who therefore can access VPCI—may nonetheless be involved in Competitive Decision-Making in the future. As noted below, courts have concluded that these individuals cannot reasonably be expected to "forget" the terms of Carriage Agreements once they learn about them. And it is unrealistic to assume

[35] Order, 7 n.30 ("We do not view it as a violation of our order to fail to segregate documents containing VPCI in these proceedings if a Submitting Party can demonstrate that it used all reasonable efforts to identify and segregate all documents containing VPCI for purposes of the Modified Joint Protective Orders.").

that the knowledge gained by outside agents will not benefit these agents' clients even if the agents do not overtly disclose to those clients what they have learned.

These concerns are not merely theoretical. Certain individuals who have requested access to VPCI under the Modified Joint Protective Orders, ostensibly on behalf of trade association clients that themselves do not engage in carriage negotiations,[36] are known to participate in contract negotiations on behalf of distributor clients. Therefore, there is a significant and irreducible risk that these individuals will be in a position to take knowledge derived from their review of such information into account in the context of current or future negotiations, to the detriment of the Content Companies and the competitive marketplace.

Third, the Orders' restrictions on the use of information contained in Carriage Agreements for anticompetitive purposes cannot be successfully implemented. As federal courts have observed, once a person gains access to confidential information, there is a high risk that the individual may inadvertently and inappropriately use the information because a person cannot "perform a prefrontal lobotomy on himself or herself" to eradicate the knowledge gained.[37] Even if an individual violates—whether subliminally or purposefully—the Orders' prohibitions on the competitive use (or misuse) of Carriage Agreements, it would be virtually impossible for the Content Companies or the Commission to detect such violations. And once any impermissible use of Carriage Agreements or negotiation materials occurs, the Commission

[36] *See, e.g.*, Acknowledgments of the ACA.

[37] *AMP, Inc. v. Fleischhacker*, 823 F.2d 1199, 1201 (7th Cir. 1987) (citing *Fleming Sales Co., Inc. v. Bailey*, 611 F. Supp. 507, 514 (N.D. Ill. 1985)); *see also Autotech Tech. Ltd. P'ship v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 408 & n.3 (N.D. Ill. 2006).

could never undo the resulting harm to the Content Companies' business and marketplace competition.[38]

2. Disclosure Of The Content Companies' Highly Sensitive Confidential Information Will Cause Irreparable Harm.

The Content Companies ensure the highest possible level of confidentiality for their Carriage Agreements, which are subject to tight internal controls by the Content Companies and distributors alike. Carriage Agreements generally are subject to stringent, bargained-for mutual confidentiality provisions that prevent each party to a Carriage Agreement from disclosing its terms. These confidentiality provisions, not surprisingly, strictly prohibit third parties from having access to the terms of Carriage Agreements. And they may include additional protections; for example, they may limit the universe of the parties' own employees who are authorized to review the terms of a Carriage Agreement.

The Commission has long acknowledged that these types of precautions are warranted and serve compelling interests. As the Commission has observed, "disclosure of programming contracts between [MVPDs] and programmers can result in substantial competitive harm to the information provider."[39] The Bureau likewise observed that Carriage Agreements and the accompanying negotiation materials "contain highly sensitive information that is central to [the Content Companies'] business strategies, including, among other things, pricing and business terms."[40] The antitrust laws, meanwhile, prohibit competitors from sharing confidential

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[38] Although the Orders prohibit printing, copying and electronic imaging of VPCI made available for review, they do not bar Reviewing Parties from taking notes of VPCI, or even from transcribing those materials, including the most highly sensitive pricing information.

[39] 1998 Policy Statement, 13 FCC Rcd. at 24852.

[40] Order, ¶ 13. The Transaction Reviews Blog Post goes even further. Transaction Reviews Blog Post at 2 ("Access to the Applicants' contracts could allow someone to obtain a detailed, industry-wide overview of the current and future programming market. Indeed, because the (continued…)

contract terms precisely because access to such information can facilitate agreements that unfairly restrain trade and competition.[41]

The Orders subvert these fundamental privacy and competition principles in at least two respects. *First*, the Orders would give MVPDs and other content distributors access to the Content Companies' Carriage Agreements with the Transaction Parties, which are the country's largest programming distributors. Because the Content Companies may negotiate affiliation and distribution agreements with numerous MVPDs nationwide, an MVPD that knows the terms of a Content Company's Carriage Agreements with the Transaction Parties would have an unfair advantage in negotiating its own distribution agreement with that Company. The content distributors would have no incentive to negotiate or to arbitrate reasonable rates, or other terms and conditions, with the Content Company if it knew the terms of the Content Company's other most significant Carriage Agreements.

Here, again, these are not theoretical concerns. At least one large distributor has expressly asked to "view and analyze" the Content Companies' Carriage Agreements.[42] In addition, multiple trade associations that collectively represent more than 1,700 small and

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AT&T and Comcast transactions are pending simultaneously, the ability to capture an understanding of the programming marketplace is greater, and potentially more troublesome, than if only one were before us.").

[41] *See* 15 U.S.C. § 1; *United States v. Container Corp. of Am.*, 393 U.S. 333, 337-38 (1969) (holding exchange of price information violated the Sherman Act). *See also* 13 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 2111c, 2111g(5) (3d ed. 2012) ("The basic concerns of any exchange of information among rivals are collusion or collusion-like behavior, and exclusion. . . . Ad hoc competitor-to-competitor 'exchange' of particularized price information, such as the price offered or made to a particular customer, should ordinarily be considered a naked or nearly naked restraint.").

[42] Comments, filed by Dish Network Corp., at 3, MB Docket Nos. 14-57, 14-90 (Sept. 26, 2014); *see also* Comments, filed by CenturyLink, at 2, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014) (noting that "interested parties" must be able to "review and comment on these materials").

medium-size distributors have specifically asked to review pricing information.[43] Each of these distributors is an actual or potential buyer of the Content Companies' programming networks, and must negotiate a Carriage Agreement with a Content Company before it can deliver that Company's programming. Representatives from several of these distributors and trade associations already have requested access to the Content Companies' VPCI under the Modified Joint Protective Orders.[44]

Second, the Orders will give other content producers and owners—direct competitors of the Content Companies—access to information about the terms of the Content Companies' proprietary relationships with distributors. Content owners could negotiate more favorable distribution agreements because they would have knowledge of the terms, conditions, and pricing structure on which the Content Companies sell their programming. They could act strategically to price and to market their own services and to undermine the Content Companies' efforts to acquire popular programming rights at the expense of the Content Companies' business interests and the public interest in competition.

B. A Stay Is Appropriate Because The Content Companies Are Likely To Prevail On The Merits.

A stay is warranted because the Content Companies are likely to prevail on the merits of their Application for Review. *First*, the Bureau lacked authority to issue the Orders because its decision to compel mass disclosure of all Carriage Agreements is an abrupt and

[43] *See, e.g.*, Acknowledgments filed by American Cable Association; Cinnamon Mueller; and Kelley, Drye & Warren, MB No. No. 14-57 (April 9, 2014); Acknowledgments filed by Independent Telephone & Telecommunications Alliance (ITTA), MB No. 14-57 (April 8, 2014).

[44] Acknowledgments on behalf of the ACA, MB Docket No. 14-57 (Posted Oct. 9, 2014); Acknowledgments on behalf of DISH Network, MB Docket No. 14-57 (Posted Oct. 9, 2014).

unexplained departure from Commission precedent and practice.[45] *Second*, by failing to make a "persuasive showing" why public disclosure of Carriage Agreements and related negotiation materials is necessary, the Orders violate the Trade Secrets Act.[46] *Third*, the Orders are arbitrary and capricious because they require disclosure of the type of highly sensitive confidential, third-party information that would not be allowed in civil court proceedings.[47]

1. The Bureau Lacked Authority to Promulgate The Orders, Which Are Contrary To The Commission's Practice And Precedent.

Under the Communications Act, the Bureau may not exercise any decision-making authority that has not been delegated to it by the Commission.[48] Here, because the Orders involve "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines," the Commission's regulations do not give the Bureau authority to act.[49] Instead, the Bureau was required to refer to the Commission any decision to provide public access to Carriage Agreements.

The Commission has not expressly authorized the Bureau to compel mass public disclosure of Carriage Agreements or to compel the production of information related to the negotiation of those agreements. To the contrary, the Commission has long acknowledged that "disclosure of programming contracts between [MVPDs] and programmers can result in substantial competitive harm to the information provider."[50] The Bureau acknowledged that the "key terms" of these Agreements "have historically been treated as especially sensitive from a

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[45] *See* Section II.B.1, below, pages 16-19.

[46] *See* Section II.B.2, below, pages 19-22.

[47] *See* Section II.B.3, below, pages 22-24.

[48] *See* 47 U.S.C. § 155(c).

[49] 47 C.F.R. § 0.283(c).

[50] *See* 1998 Policy Statement, 13 FCC Rcd. at 24852.

competitive standpoint and involve highly confidential information."[51] The Orders—in conjunction with the IDRs—thus mark an abrupt and unexplained departure from the Commission's prior recognition that the public interest mandates strict protection of the confidentiality of highly sensitive Carriage Agreements.[52]

In fact, the Orders appear to mark a departure from Commission precedent in evaluating proposed MVPD mergers. As far as the Content Companies are aware, never before has the Commission required that Carriage Agreements—including the highly proprietary pricing information contained in those Agreements *and* information relating to the negotiation of those Agreements—categorically be made available for public inspection in connection with a merger review proceeding. In previous such transactions—for example, in the DIRECTV/LibertyMedia and AT&T/Comcast proceedings—the Content Companies understand that the Commission undertook its review without placing carriage agreements or materials relating to the negotiation of those agreements in the record.[53] As recently as 2010, in evaluating and approving the merger of Comcast and NBC Universal, the Content Companies believe that the Commission concluded that it was not necessary to make carriage agreements (much less negotiation materials) publicly accessible.

Instead, the Commission reviewed carriage agreements among the Hart-Scott-Rodino documents provided to the Department of Justice in lieu of requiring separate, and in some cases duplicative, production of carriage agreements in the record of the Commission's

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[51] Order, ¶ 2.

[52] The Transaction Reviews Blog Post stated that the Orders are "unique." Transaction Reviews Blog Post at 1, 2.

[53] The Orders assert that in the Adelphia merger, carriage agreements were made available for public inspection under a protective order. Order, 8 n.32. However, as far as the Content Companies are aware, no carriage agreements were actually made available in that proceeding.

own proceedings.[54] The Commission has recognized for more than a decade that "[t]he public and the parties to a license transfer proceeding are well served by coordination between the Commission and the DOJ," an approach which "allows the Commission to focus its inquiry on the public interest issues that are truly relevant to a proposed transaction."[55] Coordinated review of materials in the custody of the Justice Department also is consistent with the Commission's directive that the Bureau has "an obligation not to overreach in our discovery requests *when confidential third party agreements are at issue*."[56] And this practice has been expressly upheld by the D.C. Circuit.[57]

The Bureau's only explanation for declining to follow Commission precedent here is its conclusory assertion that bifurcated review is "unnecessary in light of the protections in place pursuant to this Order and would unduly burden and delay the Commission's review, inhibit public participation, and therefore disserve the public interest."[58] The Orders offer no explanation, or factual or legal rationale, for the Bureau's view that it is necessary to place highly sensitive confidential Carriage Agreements, together with materials relating to the negotiation of

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[54] The ACA suggests that the Commission made Carriage Agreements publicly available pursuant to a protective order in connection with the 2010 transaction. ACA Comments, 3 n.6. The Content Companies believe that the Commission did not do so; instead, Commission staff reviewed Hart-Scott-Rodino documents at the Department of Justice.

[55] *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.*, MB Docket No. 02-70, FCC 02-301, ¶ 16 (Nov. 6, 2002).

[56] *Id.* (emphasis added).

[57] *Consumer Fed'n of Am. v. Fed. Commc'ns Comm'n*, 348 F.3d 1009, 1012-14 (D.C. Cir. 2003); *see also SBC Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (concluding it was "entirely reasonable" for the Commission to not address industry-wide issues during review of a merger).

[58] Order, ¶ 14.

those Agreements, in the record in *these* proceedings, when it was able to complete its review of numerous other merger proceedings without doing so.[59]

2. The Orders Violate the Trade Secrets Act.

The Trade Secrets Act prohibits government agencies from disclosing sensitive business data unless "authorized by law" to do so.[60] The Commission has stated that a disclosure decision is "authorized by law" under the Trade Secrets Act only if the disclosure takes place pursuant to a regulation that "(i) is substantive in that it affects individual rights and obligations, (ii) is rooted in a grant of power by Congress and (iii) was promulgated in conformance with any procedural requirements established by Congress, such as those found in the Administrative Procedure Act."[61]

The Commission's own rules provide that "[p]rogramming contracts between programmers and [MVPDs]"—like the Carriage Agreements at issue here—may not be made publicly accessible unless "[a] persuasive showing as to the reasons for inspection" has been made.[62] Further, the D.C. Circuit has placed a heavy burden on the Commission to explain—

[59] *See, e.g.*, *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 373 F.3d 372, 389-90 (3d Cir. 2004) (noting that in a review under the "arbitrary and capricious" standard, courts must ensure that "the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" (internal quotation marks and citations omitted)).

[60] 18 U.S.C. § 1905.

[61] *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 11 FCC Rcd. 12406, 12413 (March 25, 1996) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979)); *see also* 1998 Policy Statement, 13 FCC Rcd. at 24820-21.

[62] 47 C.F.R. § 0.457(d)(1)(iv).

before it may make a person's highly sensitive and confidential information available to competitors—that doing so will outweigh the risk of competitive harm.[63]

For at least three reasons, the Orders fail to make a "persuasive showing" that public access to the Content Companies' Carriage Agreements is necessary and that no effective procedural alternatives to public disclosure are available. As a result, the Bureau has not been "authorized by law" to disclose those Agreements.

First, the Orders fail to explain why it is necessary to depart from precedent in order to make the Carriage Agreements publicly available in connection with the Commission's review of the proposed transactions. As discussed above, as a matter of policy the Commission has long disapproved of making carriage agreements publicly accessible. The Commission also has not placed carriage agreements and negotiation materials in the public domain when reviewing prior transactions. The Orders do not explain their departure from the Commission's precedent and prior practice; instead, it relies on assertions by certain distributors (and one of their trade associations) that *third-party* access to pricing and other sensitive terms is necessary to *the Commission's* review of the transactions.[64] These and other conclusory statements are not enough to justify a departure from the Commission's prior practice and its longstanding policy of protecting highly sensitive, confidential carriage agreements.[65]

Second, the Orders fail to explain why it is necessary to make *every* Carriage Agreement and *all* negotiation materials related to those Agreements publicly available in order

[63] *Qwest Commc'ns. Int'l Inc. v. Fed. Commcn's Comm'n*, 229 F.3d 1172, 1183-84 (D.C. Cir. 2000) (remanding to FCC for further consideration whether protective order can adequately protect private party's competitive interests and explanation why an unprecedented release of raw audit data to competitors was the only way to achieve meaningful public comment).

[64] Order, ¶¶ 3, 13.

[65] *See Qwest Commc'ns*, 229 F.3d at 1183-84.

to review the proposed transactions. Under the Orders, unredacted versions of *every* Carriage Agreement and *all* negotiation materials related to those Agreements will be made publicly available, even if those materials have no relevance to the Commission's review of the proposed transactions. As it has done in previous proceedings, the Commission could review these materials provisionally either *in camera* or in the custody of the Department of Justice, and then place in the record only those materials determined to be necessary to its review.[66] The Commission also could order the redaction of all identifying information from any agreements it makes publicly available,[67] and if pricing information was determined to be necessary to public review, the Commission could require a combination of redaction with the production of anonymized rate cards or a spreadsheet or schedule setting out the universe of rates paid under the Carriage Agreements.[68] As the Content Companies have advised the Commission, these measures would limit the Orders' harmful effects on the Content Companies and the competitive marketplace.[69] Yet the Bureau did not explain why it did not implement one or more of these options. In fact, the Orders do not even acknowledge these options.

Third, the Orders fail to explain how the benefit of making Carriage Agreements publicly available outweighs the harm to the Content Companies and the public interest if the

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[66] *Consumer Fed'n of Am.*, 348 F.3d at 1012-14 (finding Commission did not abuse its discretion, in its review of proposed merger of cable television companies, by declining to make non-exclusive agreement between cable company and affiliated Internet service provider (ISP) part of record; Commission properly provisionally received and reviewed ISP agreement to determine it was not relevant and did not merit inclusion in the merger record).

[67] 1998 Policy Statement, 13 FCC Rcd. at 24853 ("Orders may refer to industry-wide data that is aggregated in a manner that does not reveal confidential information," and "releasing an order that cites to but does not reveal confidential information remedies confidentiality concerns."). *Cf.* 47 C.F.R. § 0.459 (a)(1).

[68] Comments, filed by Content Companies, MB Docket Nos. 14-57, 14-90 (Oct. 3, 2014).

[69] *Id.*

Content Companies' highly sensitive confidential information is used in competitive decision-making. As explained above, it is highly likely that misuse of the Content Companies' highly sensitive information will occur.[70] Yet the Orders do not consider the harm to competition and to the public interest that would result if even inadvertent disclosure occurs.

The Orders assume, without explanation, that "appropriate sanctions for violations of its protective orders" will be enough to deter misuse of VPCI.[71] However, as explained above, it is likely that individuals who gain access to the Content Companies' highly sensitive confidential information will inadvertently use that information to facilitate competitive decision-making. The threat of Commission sanctions will not be sufficient to deter inadvertent misuse. Nor will the threat of sanctions deter individuals who are non-lawyers and who have no regular business before the Commission. Moreover, even a purposeful use of the Content Companies' Carriage Agreements and negotiation materials for competitive decision-making will be impossible to detect. The Orders do not explain—such as by reviewing its prior efforts to enforce protective orders—how the Bureau plans to detect, investigate, and prosecute violations of the Orders, which will cause immediate and irreparable harm to the Content Companies and the public interest.

3. The Orders Fail To Provide Protections Courts Commonly Require Before Requiring Non-Parties To Disclose Confidential Information.

The Content Companies are not parties to the transactions. They are not subject to IDRs, and they have no ability to redact or otherwise manage their proprietary information that may be disclosed by the Transaction Parties in response to the IDRs. Yet the Content Companies would be uniquely harmed if their highly sensitive confidential Carriage Agreements

[70] *See* Part II.A.1.

[71] Order, ¶ 7.

were made available to their competitors or other distributors. The Orders fail to explain why public disclosure is necessary in the context of the Commission's transaction review process—a process that is intended to preserve and promote the public interest in competition in the video marketplace—when a court would shield such non-party information from disclosure in analogous circumstances.

Federal courts carefully guard against forcing a non-party to disclose confidential information. Courts repeatedly have recognized that special protections are necessary when a non-party is asked to produce confidential commercial information because "[i]t would be divorced from reality to believe that [a litigation party] . . . would serve as the champion of its [non-party competitor] either to maintain the confidentiality designation or to limit public disclosure as much as possible. . . ."[72] These protections are especially important when a non-party's pricing information is at issue.[73]

Courts routinely recognize that requiring a non-party to disclose confidential documents—including those addressing price and other proprietary contractual terms—gives competitors an unfair advantage.[74] For these reasons, courts generally refuse to require a non-party to produce its confidential business information if the information could be viewed by or disclosed to a competitor,[75] or if the disclosure would otherwise damage a non-party's ability to

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[72] *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990).

[73] *See id.*; *cf. Fed. Trade Comm'n v. OSF Healthcare Sys.*, No. 11-50344, 2012 WL 1144620, at *8 (N.D. Ill. April 5, 2012) (recognizing that the manner in which a business prices its products and services is generally confidential).

[74] *See Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 548-49 (N.D. Ind. 1991) (declining to require production of all governing board minutes where likely to reveal confidential commercial information).

[75] *See Echostar Commc'ns Corp. v. The News Corp.*, 180 F.R.D. 391, 395 (D. Colo. 1998); s*ee also*, *e.g.*, *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987); *Educ. Logistics*,
(continued…)

compete in the marketplace.[76] Where produced among parties, courts generally protect pricing information, viewing it under seal—in a manner analogous to the treatment the Content Companies have requested here. Because pricing information is so sensitive, courts generally will protect it from disclosure on a public docket. Moreover, because non-parties are essentially powerless to protect their interests when their confidential information has been produced, courts rarely conclude that their privacy interests can be safeguarded with a protective order.[77] Instead, even when confidential business information is relevant to an underlying dispute, courts nonetheless prohibit public access to the information if the potential harm of disclosure to a third party outweighs the benefit to the litigation.[78]

In marked contrast to the protection a court would provide if the Carriage Agreements were requested in litigation, the Orders require the automatic, public disclosure of pricing and other contractual terms (and related negotiation materials) essential to ensuring that the Content Companies can compete fairly in the marketplace and without considering the potential harm to the Content Companies and the public interest. The Content Companies have no advance notice of whether their highly sensitive confidential information will be produced to the Commission and no ability to determine if it has been properly designated.

C. Other Factors Weigh In Favor Of A Stay.

Staying the Orders while the Commission considers the merits of the Application for Review would not harm any party. In fact, the Transaction Parties already have agreed that

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Inc. v. Laidlaw Transit, Inc., 2011 WL 1348401, at *2 (N.D. Tex. April 8, 2011); *R & D Bus. Sys. v. Xerox Corp.*, 152 F.R.D. 195, 197 (D. Colo. 1993).

[76] *Echostar Commc'ns. Corp.*, 180 F.R.D. at 395; *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 528-29 (D. Del. 2002).

[77] *See Educ. Logistics, Inc.*, 2011 WL 1348401, at *4.

[78] *Id.*

the terms of the Carriage Agreements with the Content Companies should be kept confidential. They cannot complain that their interests will be harmed if the result of a stay is consistent with their underlying contractual obligations. Nor will Commission review delay the Commission's overall review of the underlying proposed merger transactions. In MB Docket No. 14-57, the Bureau stopped the informal 180-day transaction clock until at least October 29, 2014.[79] In MB Docket No. 14-90, the comment cycle remains open.

Moreover, the public interest and competition would be served by staying the Orders. As described above, the anti-competitive harms of public disclosure of the Carriage Agreements would be immediate and irreparable. Armed with the information gleaned from their review of the Carriage Agreements, the Content Companies' competitors and distributors, through their outside counsel and consultants, could immediately begin negotiating carriage agreements with knowledge of the pricing and other highly sensitive confidential and proprietary terms of the Carriage Agreements—even though the antitrust laws would prohibit the Content Companies from sharing with their competitors confidential pricing terms. The public interest would not be harmed by maintaining the *status quo* and continuing to keep the Carriage Agreements out of the public domain.

IV. CONCLUSION

For all of the foregoing reasons, the Commission should stay the Orders pending its consideration of the Application for Review.

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[79] *Public Notice*, FCC Extends Time to File Replies to Responses and Oppositions for Its Review of Application of Comcast Corp., Time Warner Cable, Inc., Charter Communications, Inc., and Spinco to Assign and Transfer Control of FCC Licenses and Other Authorizations, MB Docket No. 14-57, DA 14-1446 (Oct. 3, 2014).

Respectfully submitted,

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Dated: October 14, 2014.

EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications of Comcast Corporation and Time Warner Cable Inc., Charter Communications Inc. and SpinCo, for Consent to Assign Licenses or Transfer Control of Licensees	)))))))))	MB Docket No. 14-57
Applications of AT&T, Inc. and DIRECTV, for Consent to Assign Licenses or Transfer Control of Licensees	))))))))	MB Docket No. 14-90

APPLICATION FOR REVIEW

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Dated: October 14, 2014

SUMMARY

There is no dispute that carriage agreements between programmers and broadcasters and content distributors contain highly sensitive competitive information. There is also no dispute that disclosure of pricing information and other highly sensitive terms of those agreements will cause substantial harm to the contract parties and to the public interest. Accordingly, the Commission historically has afforded the highest level of protection to these materials in its merger review proceedings, including by reviewing them in the custody of the Department of Justice.

The three related Orders governing the treatment of certain highly sensitive confidential commercial information released by the Media Bureau on October 7, 2014, depart from Commission precedent and policy respecting the confidentiality of the terms and conditions of proprietary commercial agreements. Pursuant to the Orders, members of the public will have access to unredacted confidential carriage agreements, and highly sensitive competitive information relating to the negotiation of those agreements, between programmers and broadcasters and the parties to the instant transactions—notwithstanding the availability of alternative protective measures that would help preserve the confidentiality of third-party information without impeding the Commission's review of the transactions.

The Orders do not accomplish the Bureau's proposed objective of ensuring that highly sensitive commercial information is not used to harm programmers and broadcasters, the competitive marketplace, or the public. Therefore, if the Commission concludes that it is necessary and appropriate for carriage agreements and related negotiation materials to be placed in the record of these proceedings, the Orders must be further modified in order to ensure that the interests of the counterparties to those materials are adequately protected. Specifically, as programmers and broadcasters have proposed to the Bureau:

- Consistent with Commission precedent and practice, highly sensitive materials should be subject to provisional review by Commission personnel either in the custody of the Department of Justice or *in camera*.

- Only those materials determined as a result of that review to be relevant to the Commission's consideration of the transactions should be placed in the FCC record of the proceedings.

- Any materials designated for placement in the record should be redacted and anonymized before being made publicly available.

- The Transaction Parties should bear the burden of ensuring that materials placed in the record have been properly designated, and the Content Companies should have the opportunity to demonstrate that undesignated or improperly designated materials should be subject to heightened protection before these materials are placed in the record.

- To the extent public disclosure of the Content Companies' most sensitive information is provided, the Commission should require reviewers to make particularized showings why they need access to such information, and should restrict them from taking notes of this information.

These modifications are necessary because, in their current form, the Orders conflict with Commission precedent, rules, and policies and with federal law. For example, the Bureau lacked authority to issue the Orders because the Commission has not previously compelled the mass public disclosure of carriage agreements and related negotiation materials. The Orders also fail to explain why they departed from the Commission's historical practice, using procedures upheld by the courts, of having its personnel review highly sensitive materials at the Department of Justice to determine whether it was necessary to place particular items in the record. Finally, the Orders fail to make a "persuasive showing" that public review of carriage agreements, with the attendant risk of unauthorized and uncontrollable disclosure, outweighs the resulting harm to programmers and broadcasters, competition in the programming distribution marketplace, and the public interest.

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FEDERAL COMMUNICATIONS COMMISSION
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APPLICATION FOR REVIEW

INTRODUCTION

Pursuant to Section 1.115 of the Commission's Rules, CBS Corporation, Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc., together and respectively on behalf of their affiliated businesses (collectively, the "Content Companies"), hereby respectfully request that the Commission vacate the Media Bureau's (the "Bureau") Order, DA 14-1463, and direct the Bureau to further clarify or modify the associated Modified Joint Protective Orders, DA 14-1464 (14-57) and DA 14-1465 (14-90), released concurrently in the captioned proceedings on October 7, 2014.[1]

As discussed below, clarified or modified procedures are necessary to ensure that the Content Companies' confidential affiliation and distribution agreements ("Carriage Agreements") with the parties to the captioned transactions (the "Transaction Parties"), and highly sensitive proprietary commercial information related to the negotiation of those Agreements, are adequately protected from public disclosure and dissemination. Review is warranted because the Orders involve a question of law or policy that has not been resolved by

[1] *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, MB Docket Nos. 14-57, 14-90, DA 14-1463 (Oct. 7, 2014) (the "Order"); *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorization*, Modified Joint Protective Order, MB Docket No. 14-57, DA 14-1464 (Oct. 7, 2014) ("Modified Joint Protective Order 14-57"); *In the Matter of Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorization*, Modified Joint Protective Order, MB Docket No. 14-90, DA 14-1465 (Oct. 7, 2014) ("Modified Joint Protective Order 14-90"). Because Modified Joint Protective Order 14-57 and Modified Joint Protective Order 14-90 are substantively identical, they are referred to collectively as the "Modified Joint Protective Orders." The Order and the Modified Joint Protective Orders are collectively referred to as the "Orders."

the Commission and because the Orders are in conflict with statute, regulation, case precedent, and established Commission policy. *See* 47 C.F.R. § 1.115(b)(2)(i), (ii).

To be clear, this Application for Review does not seek to prevent the Commission or its staff from reviewing the Content Companies' Carriage Agreements. The Content Companies ask only that the Commission—consistent with its prior practice and procedure—preliminarily review these materials, place only relevant materials in the public record, and ensure that any materials placed in the public record are redacted and anonymized to protect the Content Companies' privacy and confidentiality interests and the competitive marketplace.

QUESTIONS PRESENTED

1. Whether the Bureau lacked authority to issue the Orders compelling the unprecedented public disclosure of Carriage Agreements and related negotiation materials because doing so involved questions of law or policy that have not previously been resolved by the Commission.

2. Whether the Orders, which fail to make a "persuasive showing" that unprecedented public disclosure of Carriage Agreements and negotiation materials is warranted in this case, are contrary to Commission precedent and violate the Trade Secrets Act, the Administrative Procedure Act, and the Commission's Rules.

BACKGROUND

A. The Content Companies' Carriage Agreements.

The Content Companies ensure the highest possible level of confidentiality for their Carriage Agreements, which are subject to tight internal controls by the Content Companies and distributors alike. Carriage Agreements generally are subject to stringent, bargained-for mutual confidentiality provisions that prevent each party from disclosing its terms. These confidentiality provisions, not surprisingly, prohibit third parties from having access to the terms of Carriage Agreements. And they may often limit the universe of the parties' own employees who are authorized to review the terms of a Carriage Agreement.

For its part, the Commission has long recognized that "disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider."[2] The Bureau likewise observed that Carriage Agreements and associated negotiation materials "contain highly sensitive information that is central to [the Content Companies'] business strategies, including, among other things, pricing and business terms."[3]

There is no dispute, therefore, that the Content Companies, the highly competitive programming distribution marketplace in which they operate, and the public interest would be harmed if the terms of their Carriage Agreements were publicly disclosed. For example, because the Content Companies must negotiate separate affiliation and distribution agreements with numerous multi-channel video programming distributors ("MVPDs") and other content distributors nationwide, a distributor that knows the terms of a Content Company's Carriage Agreements with the Transaction Parties would have an unfair advantage in negotiating its own distribution agreement with that Company. Similarly, if other content owners learned the terms of a Content Company's Carriage Agreements, they could negotiate more favorable distribution agreements of their own and act strategically to price and to market their own services.

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[2] *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, FCC 98-184, 13 FCC Rcd. 24816, 24852 (1998) (the "1998 Policy Statement").

[3] Modified Joint Protective Orders, ¶ 13. A blog entry posted on the Commission's website the same day the Orders were released goes even further. Bill Lake, et al., *Transaction Reviews and the Public Interest*, The Official FCC Blog, at 2 (Oct. 7, 2014, 2:57 PM), *available at* http://www.fcc.gov/blog/transaction-reviews-and-public-interest (the "Transaction Reviews Blog Post") ("Access to the Applicants' contracts could allow someone to obtain a detailed, industry-wide overview of the current and future programming market. Indeed, because the AT&T and Comcast transactions are pending simultaneously, the ability to capture an understanding of the programming marketplace is greater, and potentially more troublesome, than if only one were before us.").

B. The Content Companies' Proposals To Protect Their Highly Sensitive Confidential Information.

In connection with its review of the captioned transactions, the Bureau issued Information and Data Requests ("IDRs") to Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("TWC"), and Charter Communications Inc. ("Charter") (in MB Docket 14-57), and to AT&T, Inc. ("AT&T") and DIRECTV (in MB Docket 14-90).[4] As the Bureau acknowledged, its IDRs "seek, among other things, certain types of contracts (*e.g.*, programming and retransmission consent agreements) whose key terms have historically been treated as especially sensitive from a competitive standpoint and involve highly confidential information."[5]

The Content Companies are not parties to the transactions under review in these proceedings. They are not subject to IDRs, and they have no ability to redact or otherwise manage their proprietary information that may be disclosed by the Transaction Parties in response to the IDRs. Public disclosure of highly sensitive information contained in the Carriage Agreements and related negotiation materials would cause substantial, irreparable harm to the Content Companies' businesses and to competition in the video distribution marketplace. Accordingly, the Content Companies and other programmers and broadcasters advised the

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[4] *See* Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corp. (Aug. 21, 2014), and Information and Data Request to Comcast Corporation; Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Steven Tepliz, Senior Vice President, Gov't Relations, Time Warner Cable Inc. (Aug. 21, 2014), and Information and Data Request to Time Warner Cable Inc.; Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Catherine Bohigian, Exec. Vice President, Gov't Affairs, Charter Commc'ns, Inc. (Aug. 21, 2014), and Information and Data Request to Charter Commc'ns, Inc.; Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Robert W. Quinn Jr., Senior Vice President - Fed. Regulatory & Chief Privacy Officer, AT&T Services, Inc. (Sept. 9, 2014), and AT&T Information and Discovery Requests; Letter from William T. Lake, Chief, Media Bureau, Fed. Commc'ns Comm'n, to Stacy Fuller, Vice President, Regulatory Affairs, DIRECTV (Sept. 9, 2014), and DIRECTV Information and Discovery Requests.

[5] Order, ¶ 2.

Bureau of their concern that the Joint Protective Orders issued in the proceedings did not adequately protect the confidentiality of their Carriage Agreements or negotiation materials and thereby risked harm to the public interest.[6]

Among other things, the Content Companies urged the Bureau to adopt the approach that had been successfully implemented in other merger proceedings by arranging for Commission personnel to review copies of Carriage Agreements that had been provided to the Department of Justice. The Content Companies encouraged the Bureau to place in the record only those Carriage Agreements and related materials determined by the Commission to be relevant to its consideration of the transactions, and that it redact and/or anonymize the most sensitive information in any such materials ultimately placed in the record.[7]

In response, on September 23, 2014, the FCC sought public comment on the concerns raised by the Content Companies and other programmers and on the nature and extent of possible modifications to the Joint Protective Orders.[8] Twenty-six parties, filing either jointly or individually, opposed disclosure of Carriage Agreements.[9] Instead, commenters supported the Content Companies' position that the confidentiality of highly sensitive Carriage Agreements

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[6] *See Media Bureau Seeks Comment on Issues Raised by Certain Programmers and Broadcasters Regarding the Production of Certain Documents in Comcast-Time Warner Cable-Charter and AT&T-DIRECTV Transaction Proceedings*, MB Docket Nos. 14-57, 14-90, DA 14-1383, at 1 (Sept. 23, 2014); *see also* Letter from Mace Rosenstein, Covington & Burling LLP, to Marlene H. Dortch, Secretary, Fed. Commc'ns Comm'n (Sept. 23, 2014).

[7] It is not accurate that—as the Transaction Reviews Blog Post suggested—the Content Companies took the "position that the contracts . . . with the [Transaction Parties] should not be received by the Commission." Transaction Reviews Blog Post at 1.

[8] *Media Bureau Seeks Comment on Issues Raised by Certain Programmers and Broadcasters Regarding the Production of Certain Documents in Comcast-Time Warner Cable-Charter and AT&T-DIRECTV Transaction Proceedings*, MB Docket Nos. 14-57, 14-90, DA 14-1383, at 1 (Sept. 23, 2014); *see also id.*, Attach. 3 (DA-14-1383A4) & Attach. 4 (DA-14-1383A5).

[9] *See, e.g.*, Comments, filed by Content Companies, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); Comments, filed by Content Companies, MB Docket Nos. 14-57, 14-90 (Oct. 3, 2014).

and related materials could be assured only by segregated review by Commission personnel at the Department of Justice or by anonymization and/or redaction of price and other confidential terms and conditions of any materials placed in the record of the Proceedings.

By contrast, only three commenters supported public access to raw, unredacted Carriage Agreements and related negotiation materials.[10] Each of these commenters would benefit commercially from access to information about rates paid and other terms; one of those commenters is a larger purchaser of the Content Companies' programming and justified its need to review carriage agreements on the ground that it intended to "view and analyze" prices paid by the Content Companies to the commenter's competitors.[11]

C. The Bureau's Orders.

On October 7, the Bureau issued the Orders. Modified Joint Protective Order 14-57 replaces the Joint Protective Order issued in MB Docket No. 14-57. Modified Joint Protective Order 14-90 replaces the Joint Protective Order issued in MB Docket No. 14-90. The Order sets forth the Bureau's rationale for issuing the Modified Joint Protective Orders.

The Bureau agreed that Carriage Agreements and related negotiation materials "contain highly sensitive information that is central to the contracting parties' . . . business strategies, including, among other things, pricing and business terms."[12] Moreover, the Bureau acknowledged that because it currently is considering two major transactions, any decision to

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[10] Comments, filed by Dish Network Corp., MB Docket Nos. 14-57, 14-90 (Sept. 26, 2014); Comments, filed by CenturyLink, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); Comments, filed by American Cable Association ("ACA"), MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014) ("ACA Comments").

[11] Comments, filed by Dish Network Corp., MB Docket Nos. 14-57, 14-90, at 3 (Sept. 26, 2014).

[12] Order, ¶ 13.

provide public access to Carriage Agreements would "make available a scope of highly sensitive information that is both uniquely broad and extremely detailed."[13]

The Orders nonetheless propose to make publicly available unredacted Carriage Agreements, negotiation materials relating to those Agreements, and other highly sensitive "Video Programming Confidential Information" ("VPCI").[14] While the Orders impose some heightened protections, the protections are insufficient to protect the Content Companies' confidentiality interests in VPCI. Any "Outside Counsel of Record,"[15] any "Outside Consultant"[16] and certain other individuals[17] may access these materials if they execute and file an Acknowledgment of Confidentiality at any point in time during the Commission's review.[18] The Modified Joint Protective Orders afford the parties to these materials three days to object to

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[13] *Id.*

[14] "Video Programming Confidential Information" includes "an agreement, or any part thereof, for distribution of any video programming (including broadcast programming) carried by an Applicant's (i) MVPD service and/or (ii) OVD service; a detailed description of one or more provisions of such an agreement, including, but not limited to, price terms; and information relating to the negotiation of such an agreement." Modified Joint Protective Orders, ¶ 2.

[15] "Outside Counsel of Record" includes "attorney(s), firm(s) or attorneys, or sole practitioner(s), as the case may be, retained by a Participant in this proceeding, provided that such attorneys are not involved in Competitive Decision-Making." *Id*. A person is involved in "Competitive Decision-Making" if the "person's activities, association, or relationship with any of his clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party or with a Third Party Interest Holder." *Id.*

[16] "Outside Consultant" is defined to include "a consultant or expert retained for the purpose of assisting Outside Counsel or a Participant in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making." *Id*.

[17] These other individuals include employees of the Outside Counsel and Outside Consultants who are "paralegals or other employees of such Reviewing Party assisting them in this proceeding" or who are "employees of third-party contractors involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding." *Id.*, ¶¶ 7, 13.

[18] *Id.*, ¶¶ 7, 9.

any request for access made by Outside Counsel or Outside Consultants once they are posted to the Commission's website.[19] Further, although the Modified Joint Protective Orders prohibit printing or copying of VPCI, reviewing parties are not barred from taking notes or from transcribing the materials they review, including highly sensitive pricing information.[20]

The Orders provide significant protections to the Transaction Parties and little meaningful protection to the Content Companies, who are not parties to the transactions under review and did not ask for their highly sensitive information to be produced to the Commission. Under the Orders, the Content Companies and other programmers and broadcasters do not have the right to receive prior notice that their highly sensitive VPCI is to be made available for public inspection.[21] They are afforded no opportunity to determine—or even to consult regarding—which items of their proprietary information should be classified as VPCI. The Orders leave that responsibility to the sole discretion of the Transaction Parties,[22] who have expressed more interest in ensuring the prompt closing of their proposed transactions than protecting the Content Companies' highly sensitive information. And, although reviewing parties have the right to object that certain materials subject to a VPCI designation are *not* entitled to protection,[23] the Orders do not give programmers or broadcasters the reciprocal right to object that certain undesignated or improperly designated materials should be subject to *heightened* protection.

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[19] *Id.*, ¶ 8.

[20] *Id.*, ¶ 10.

[21] The Transaction Parties are not required to notify programmers or broadcasters that they are submitting materials containing VPCI. They are only "urged" to do so. *Id.*, ¶ 8.

[22] *Id.*, ¶ 3 (a "Submitting Party *may* designate" material as Highly Confidential (emphasis added)); *id.*, ¶ 6 (determination of whether Highly Confidential document "contains information so sensitive that copying of it should be restricted" rests "in the reasonable judgment of the Submitting Party").

[23] *Id.*, ¶ 4.

In the three business days after the Bureau issued the Orders, nearly 200 acknowledgements were submitted from individuals requesting access to the Content Companies' highly sensitive confidential information by submitting Acknowledgements of Confidentiality under the Modified Joint Protective Orders.[24] None of those requests provides any particularized showing explaining why the requesting individual needs to review *every* highly sensitive document produced by the Transaction Parties, or even which documents the requesting party intends to review. Further, many of the individuals who seek access to this information represent or are employees of distributors that do business with the Content Companies on a regular basis or trade associations that represent such distributors—entities that would benefit considerably from access to the deals of their competitors.

ARGUMENT

I. FURTHER MODIFICATION OF THE ORDERS IS NECESSARY TO ADEQUATELY PROTECT THE CONTENT COMPANIES' HIGHLY SENSITIVE INFORMATION.

There is no dispute that the Content Companies, the competitive marketplace, and the public interest would be significantly harmed by public disclosure of the highly sensitive terms in their Carriage Agreements. The Commission has long acknowledged that "disclosure of programming contracts between [MVPDs] and programmers can result in substantial competitive harm to the information provider."[25] The Bureau likewise acknowledged that the "key terms" of these Agreements "have historically been treated as especially sensitive from a competitive

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[24] *See, e.g.*, Acknowledgments on behalf of the ACA, MB Docket No. 14-57 (Posted Oct. 9, 2014); Acknowledgments on behalf of DISH Network, MB Docket No. 14-57 (Posted Oct. 9, 2014).

[25] 1998 Policy Statement, 13 FCC Rcd. at 24852.

standpoint and involve highly confidential information."[26] As a blog entry posted on the Commission's website the same day the Orders were released acknowledged:

> Access to the Applicants' contracts could allow someone to obtain a detailed, industry-wide overview of the current and future programming market. Indeed, because the AT&T and Comcast transactions are pending simultaneously, the ability to capture an understanding of the programming marketplace is greater, and potentially more troublesome, than if only one were before us.[27]

The Orders nevertheless fail to implement appropriate safeguards necessary to protect the confidentiality of the Content Companies' most sensitive information. In their current form, the Orders make available unredacted copies of every Carriage Agreement and all negotiation and analytical materials related to those agreements, even if those materials have no relevance to the Commission's review of the transactions. Numerous alternatives are available that would facilitate the Bureau's review of these proposed transactions with a substantially lower risk of harm to the Content Companies, the competitive marketplace, and the public.

For example, as the Content Companies urged the Bureau, the most effective way to ensure that the Content Companies' highly sensitive information is not publicly disclosed is to review either the Carriage Agreements and related negotiation materials *in camera* or review the Hard-Scott-Rodino documents provided to the Department of Justice. If the Bureau deemed it necessary to place *some* of the Content Companies' most sensitive information in the record, the Bureau could—and should—place in the record only the portions of those materials the Commission determines are necessary to its review of these proceedings. The Commission has

[26] Order, ¶ 2.

[27] Transaction Reviews Blog Post at 2.

expressly approved of—and the D.C. Circuit has upheld—the use of this approach in prior merger review proceedings.[28]

Similarly, if the Commission deems it appropriate to place any of the Content Companies' highly sensitive information in the record, the Commission could nevertheless direct the Bureau to modify the Orders to better mitigate the harm to the Content Companies, the competitive marketplace, and the public interest that will accompany public disclosure of the Carriage Agreements and related negotiation materials as follows:

> *1. The Modified Joint Protective Orders should require that any VPCI included in the record of the proceedings be subject to anonymization and/or redaction of all identifying terms and conditions.*

The Modified Joint Protective Orders make available complete, unredacted versions of the Carriage Agreements and related negotiation materials. But the harm to the Content Companies and to the public interest could be reduced by ordering the redaction of all identifying information from any materials the Commission makes publicly available and requiring the production of an anonymized spreadsheet or schedule that sets out the universe of relevant information in Carriage Agreements without identifying the parties to those Agreements. As an example, the Commission could require the redaction of party names and all other identifying characteristics—such as program format—from individual agreements. The Orders do not explain why placing only redacted and/or anonymized information in the record would impede its review of the proposed transactions.

[28] *Consumer Fed'n of Am. v. Fed. Commc'ns Comm'n*, 348 F.3d 1009, 1012-14 (D.C. Cir. 2003); *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.*, MB Docket No. 02-70, FCC 02-301 ¶ 16 (Nov. 6, 2002).

2. The Modified Joint Protective Orders should obligate the Transaction Parties to review and properly designate confidential material as "Highly Confidential" and VPCI, and notify the Content Companies before their sensitive information is produced.

The heightened protections in the Modified Joint Protection Orders apply only to information that has been properly designated. However, there is a substantial risk that the Content Companies' highly sensitive confidential information will be improperly designated or erroneously produced.

The obligation to review, classify, and produce the Content Companies' highly sensitive confidential material rests exclusively with the Transaction Parties, but the Orders give the Transaction Parties little incentive to ensure that the Content Companies' proprietary interests are protected. For example, under the Orders, the Transaction Parties "may"—but are not required to—ensure that materials are properly designated.[29] The Transaction Parties also are "urged"—but not required—to give the Content Companies advance notice that their confidential information is being produced.[30] The Orders also preemptively give the Transaction Parties immunity for "fail[ing] to segregate documents containing VPCI in these proceedings" so long as they used "all reasonable efforts to identify and segregate" such documents—an implicit acknowledgment that even the Bureau believes that the Content Companies' most sensitive information is at risk of public disclosure.[31] Modifying the Orders is necessary to provide the Transaction Parties with appropriate incentives to ensure that the transactions they have proposed will not irreversibly harm the interests of nonparties and the competitive marketplace.

[29] Modified Joint Protective Orders, ¶ 3.

[30] *Id.*, ¶ 8.

[31] Order, 7 n.30 ("We do not view it as a violation of our order to fail to segregate documents containing VPCI in these proceedings if a Submitting Party can demonstrate that it used all reasonable efforts to identify and segregate all documents containing VPCI for purposes of the Modified Joint Protective Orders.").

3. The Modified Joint Protective Orders should give the Content Companies the opportunity to review and object to any proposed production on the grounds that their confidential information has been erroneously designated before such information is made publicly available.

As described above, the Content Companies and other programmers and broadcasters currently have no opportunity to determine which items of their proprietary information should be classified as VPCI. This problem is compounded by the fact that, although reviewing parties have the right to object that certain materials subject to a VPCI designation are not entitled to protection,[32] the Orders do not give programmers or broadcasters the reciprocal right to object that certain undesignated or improperly designated materials should be subject to heightened protection or redacted before being made publicly available.

4. The Modified Joint Protective Orders should require individuals to make a particularized showing why they are entitled to access VPCI—material that the Bureau has determined is entitled to heightened protections.

The only differences between VPCI and other Highly Confidential information are certain restrictions on how information may be accessed and how that material may be duplicated. However, because any individual who has access to VPCI could "obtain a detailed, industry-wide overview of the current and future programming market,"[33] access to VPCI should be more tightly controlled and linked only to those individuals who can make a particularized, good-faith showing that their need to access this information promotes the public interest.

Such a showing is required because the Modified Joint Protective Orders currently permit Outside Counsel and Outside Consultants who work on behalf of distributors and other programmers to access VPCI. Distributors and competing programmers have the

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[32] Modified Joint Protective Orders, ¶ 4.

[33] Transaction Reviews Blog Post at 2.

most to gain—and can inflict the most harm on the competitive marketplace—from accessing VPCI. As a result, even if they do not intend to, outside counsel and consultants who represent distributors and competing programmers are nevertheless at a heightened risk of inadvertently misusing the Content Companies' most sensitive information, and should be prohibited from accessing these materials entirely.

5. The Protective Orders should be modified to restrict note-taking regarding VPCI.

The Modified Joint Protective Orders permit reviewing parties to take detailed notes of, and even transcribe, pricing and other sensitive information (for example). Permitting note-taking—without any opportunity to investigate whether any improper transcriptions have occurred—renders the prohibitions on copying, printing, and transmitting VPCI meaningless.

II. IN THEIR CURRENT FORM, THE ORDERS ARE CONTRARY TO THE COMMISSION'S RULES AND APPLICABLE LAW.

Without the proposed modifications described in Section I, the Orders are problematic in at least three respects. *First*, the Bureau lacked authority to compel the mass public disclosure of Carriage Agreements and relating negotiation materials; the Commission has never given the Bureau authority to issue the Orders, and the Orders are contrary to the Commission's precedent. *Second*, the Orders violate the Trade Secrets Act and this Commission's rules because the Orders fail to make a "persuasive showing" why public disclosure of the Content Companies' most sensitive information is warranted here. *Third*, the Orders are arbitrary and capricious because they fail to give the Content Companies the same protections that these nonparties have been afforded by the FCC in the past and would enjoy from the courts.

A. Because the Commission Has Not Previously Compelled Mass Public Disclosure of Carriage Agreements and Related Negotiation Materials, the Bureau Lacked Authority To Make the Content Companies' Highly Sensitive Information Available For Public Review.

Under the Communications Act, the Bureau may not exercise any decision-making authority that has not been delegated to it by the Commission.[34] As far as the Content Companies are aware, the Commission has not previously compelled the mass public disclosure of Carriage Agreements and related negotiation materials involving nonparties to merger proceedings; indeed, its precedent is to the contrary. Because the Orders involve "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines," the Commission's regulations do not give the Bureau authority to act.[35] Instead, the Bureau was required to refer to the Commission any decision to provide public access to Carriage Agreements and related negotiation materials involving nonparties.

The Commission has long acknowledged that "disclosure of programming contracts between [MVPDs] and programmers can result in substantial competitive harm to the information provider."[36] The Bureau acknowledged that the "key terms" of these Agreements "have historically been treated as especially sensitive from a competitive standpoint and involve highly confidential information."[37]

The Orders—in conjunction with the IDRs—appear to mark an abrupt and unexplained departure from the Commission's prior recognition that the public interest mandates strict protection of the confidentiality of highly sensitive Carriage Agreements and from

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[34] *See* 47 U.S.C. § 155(c).

[35] 47 C.F.R. § 0.283(c).

[36] *See* 1998 Policy Statement, 13 FCC Rcd. at 24852.

[37] Order, ¶ 2.

Commission precedent in evaluating proposed MVPD mergers.[38] As far as the Content Companies are aware, never before has the Commission required that Carriage Agreements—including the highly proprietary pricing information contained in those agreements—*and* information relating to the negotiation of those Agreements categorically be made available for public inspection in connection with a merger review proceeding. In previous transactions of this type—for example, in the DIRECTV/LibertyMedia and AT&T/Comcast proceedings—the Content Companies understand that the Commission undertook its review without placing carriage agreements and/or materials relating to the negotiation of those agreements in the record.[39] As recently as 2010, in evaluating and approving the merger of Comcast and NBC Universal, the Content Companies believe that the Commission concluded that it was not necessary to make nonparty carriage agreements (much less negotiation materials) publicly accessible.

Instead, the Commission has reviewed Carriage Agreements among the Hart-Scott-Rodino documents provided to the Department of Justice in lieu of requiring separate, and in some cases duplicative, production of carriage agreements in the record of the Commission's own proceedings.[40] As the Commission has recognized, "[t]he public and the parties to a license transfer proceeding are well served by coordination between the Commission and the DOJ,"

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[38] The Transaction Reviews Blog Post stated that the Orders are "unique." Transaction Reviews Blog Post at 1, 2.

[39] The Bureau asserts that in the Adelphia merger, it made carriage agreements available for public inspection under a protective order. Order, 8 n.32. However, no carriage agreements were actually made available in that proceeding, and the Adelphia protective order did not expressly encompass negotiation materials.

[40] The ACA suggests that the Commission made Carriage Agreements publicly available pursuant to a protective order in connection with the 2010 transaction. ACA Comments, 3 n.6. As far as the Content Companies are aware, the Commission did not do so; instead, Commission staff reviewed Hart-Scott-Rodino documents at the Department of Justice.

which "allows the Commission to focus its inquiry on the public interest issues that are truly relevant to a proposed transaction."[41] Coordinated review of materials in the custody of the Justice Department also is consistent with the Commission's directive that the Bureau has "an obligation not to overreach in [its] discovery requests *when confidential third party agreements are at issue*."[42] This approach has been expressly upheld by the D.C. Circuit.[43]

The Bureau's only explanation for declining to follow Commission precedent here is its conclusory assertion that review under highly protective processes is "unnecessary in light of the protections in place pursuant to this Order and would unduly burden and delay the Commission's review, inhibit public participation, and therefore disserve the public interest."[44] The Orders offer no factual or legal rationale for the view that it is necessary to place highly sensitive confidential Carriage Agreements, together with materials relating to the negotiation of those Agreements, in the record in *these* proceedings, when the Bureau was able to complete its review of numerous other merger proceedings without doing so.[45]

Even if it were necessary in this case for the Bureau to take the unprecedented step of placing certain Carriage Agreements and negotiation materials in the record, the Commission has never authorized the wholesale public disclosure of a massive amount of

[41] *Application of Comcast Corp. and AT&T Corp. for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 02-70, FCC 02-301 ¶ 16 (Nov. 6, 2002).

[42] *Id.* (emphasis added).

[43] *Consumer Fed'n of Am.*, 348 F.3d at 1012-14; *see also SBC Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (concluding it was "entirely reasonable" for the Commission to not address industry-wide issues during review of a merger).

[44] Order, ¶ 14.

[45] *See, e.g.*, *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 373 F.3d 372, 389-90 (3d Cir. 2004) (noting that in a review under the "arbitrary and capricious" standard, courts must ensure that "the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" (internal quotation marks and citations omitted)).

unredacted Carriage Agreements and related negotiation materials involving nonparties to the merger proceedings under review. As the Content Companies urged the Bureau, the more effective approach would be for the Bureau to engage in a provisional review of the highly sensitive information it has ordered the Transaction Parties to produce—either in the custody of the Justice Department or *in camera*—and place only relevant, redacted, and anonymized information in the record. The Orders did not explain why these reasonable alternative approaches were not adopted.[46]

It makes no difference that some of the Transaction Parties have claimed that these procedures would require too much work.[47] The Transaction Parties voluntarily entered into business transactions that they knew required Commission review and approval and likely would subject them to information and data requests. By contrast, the Content Companies are not parties to the transactions, and they have no ability to redact or otherwise manage any of their proprietary information that may be disclosed in the Transaction Parties' responses to the IDRs. The incremental cost to the Transaction Parties of segregating or redacting highly sensitive third-party materials in their possession pales in comparison to the harm the Content Companies and the public would be exposed to otherwise.

B. The Orders Violate The Trade Secrets Act And The Commission's Rules.

The Trade Secrets Act prohibits government agencies from disclosing sensitive business data unless "authorized by law" to do so.[48] The Commission has stated that a

[46] Order, ¶ 14.

[47] The Transaction Parties previously have stated that "identifying and segregating certain types of materials for additional protection would be a burdensome and time-consuming process." *Id.*, ¶ 3. Indeed, one of the Transaction Parties contends that performing the additional level of review necessary to isolate VPCI is "unworkable." Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corp., to Marlene H. Dortch, Secretary, Fed. Commc'ns Comm'n, MB Docket No. 14-57, at 3 (Sept. 26, 2014).

disclosure decision is "authorized by law" under the Trade Secrets Act only if the disclosure takes place pursuant to a regulation that "(i) is substantive in that it affects individual rights and obligations, (ii) is rooted in a grant of power by Congress and (iii) was promulgated in conformance with any procedural requirements established by Congress, such as those found in the Administrative Procedure Act."[49]

The Commission's own regulations provide that "[p]rogramming contracts between programmers and [MVPDs]"—like the Carriage Agreements at issue here—may not be made publicly accessible unless "[a] persuasive showing as to the reasons for inspection" has been made.[50] Further, the D.C. Circuit has placed a heavy burden on the Commission to explain—before it may make a person's highly sensitive and confidential information available to competitors—that doing so will outweigh the risk of competitive harm.[51]

Here, the Orders fail to make the required "persuasive showing" that public access to the Content Companies' Carriage Agreements is necessary and that no effective procedural alternatives to public disclosure are available.

First, the Orders fail to explain why it is necessary to depart from precedent in order to make the Carriage Agreements publicly available in connection with the Commission's review of the proposed transactions. Instead, the Orders rely on assertions by certain distributors

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[48] 18 U.S.C. § 1905.

[49] *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 11 FCC Rcd. 12406, 12413 (March 25, 1996) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979)); *see also* 1998 Policy Statement, 13 FCC Rcd. at 24820-24821.

[50] 47 C.F.R. § 0.457(d)(1)(iv).

[51] *Qwest Commc'ns. Int'l Inc. v. Fed. Commcn's Comm'n*, 229 F.3d 1172, 1183-84 (D.C. Cir. 2000) (remanding to FCC for further consideration whether protective order can adequately protect private party's competitive interests and explanation why an unprecedented release of raw audit data to competitors was the only way to achieve meaningful public comment).

(and one of their trade associations) that *third-party* access to pricing and other sensitive terms is necessary to *the Commission's* review of the transactions.[52] These and other conclusory statements are not enough to justify a departure from the Commission's prior practice and its longstanding policy of protecting highly sensitive, confidential carriage agreements.[53]

Second, the Orders fail to explain why the Bureau needs to make every Carriage Agreement and all negotiation materials related to those Agreements publicly available in order to evaluate the proposed transactions. Under the Orders, all these materials will be made publicly available even if the materials have no relevance to the Commission's review of the proposed transactions. However, as the Content Companies have advised the Commission, alternative measures—such as provisional Commission review either *in camera* or in the custody of the Department of Justice and the redaction of identifying information in the relevant Carriage Agreements made publicly available combined with the production of an anonymized spreadsheet or schedule setting out the universe of relevant information under the Carriage Agreements—would limit the Orders' harmful effects on the Content Companies and the competitive marketplace.[54] Yet the Bureau did not explain its decision not to implement any of these options.

Third, the Orders fail to explain how the benefit of making Carriage Agreements publicly available outweighs the harm to the Content Companies and the public interest if the

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[52] Order, ¶¶ 3, 13.

[53] *See Qwest Commc'ns*, 229 F.3d at 1183-84.

[54] Comments, filed by Content Companies, MB Docket Nos. 14-57, 14-90 (Oct. 3, 2014); *Consumer Fed'n of Am.*, 348 F.3d at 1012-14 (finding Commission did not abuse its discretion, in its review of proposed merger of cable television companies, by declining to make non-exclusive agreement between cable company and affiliated Internet service provider (ISP) part of record; Commission properly provisionally received and reviewed ISP agreement to determine it was not relevant and did not merit inclusion in the merger record).

Content Companies' highly sensitive confidential information is used in competitive decision-making. The Orders instead reflect the Bureau's assumption that no misuse of the Content Companies' highly sensitive information will occur. That premise is mistaken.

The Orders' restrictions on the use of information contained in Carriage Agreements for anticompetitive purposes cannot be successfully implemented. As federal courts have observed, once a person gains access to confidential information, there is a high risk that that individual may inadvertently and inappropriately use the information because a person cannot "perform a prefrontal lobotomy on himself or herself" to eradicate knowledge gained.[55]

Although the Orders purport to limit access to Carriage Agreements to Outside Counsel of Record and Outside Consultants (and their employees or agents) who are not currently engaged in Competitive Decision-Making, these individuals—like in-house employees—act on behalf of their clients in a variety of settings, including by providing advice on rates and other highly sensitive proprietary terms. Further, it is not uncommon for such individuals to participate in the negotiation of distribution agreements on behalf of multiple clients that compete with or have distribution contracts with the Content Companies. The Orders ignore the significant substantive role these individuals play in Carriage Agreement negotiations.

Nor do the Orders take into account the marketplace reality that these individuals frequently transition from acting as outside agents to serving as employees of the Content Companies' competitors and distributors. In addition, the Orders ignore the possibility that an individual who is not currently engaged in Competitive Decision-Making—and who therefore can access VPCI—may nonetheless be involved in Competitive Decision-Making in the future.

[55] *AMP, Inc. v. Fleischhacker*, 823 F.2d 1199, 1201 (7th Cir. 1987) (citing *Fleming Sales Co., Inc. v. Bailey*, 611 F. Supp. 507, 514 (N.D. Ill. 1985)); *see also Autotech Tech. Ltd. P'ship v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 408 & n.3 (N.D. Ill. 2006).

As noted above, courts have concluded that these individuals cannot reasonably be expected to "forget" the terms of Carriage Agreements once they learn about them. And it is unrealistic to assume that the knowledge gained by outside agents will not benefit their clients even if they do not overtly disclose to those clients what they have learned.

These concerns are not merely theoretical. Certain individuals who have requested access to VPCI under the Protective Orders, ostensibly on behalf of trade association clients that themselves do not engage in carriage negotiations,[56] are known to participate in contract negotiations on behalf of distributor clients. Therefore, there is a significant and irreducible risk that these individuals will be in a position to take into account in the context of future negotiations knowledge derived from their review of such information, to the detriment of the Content Companies and the public interest.

The Orders assume, without explanation, that "appropriate sanctions for violations of its protective orders" will be sufficient to deter misuse of the Content Companies' VPCI.[57] However, as explained above, it is likely that individuals who gain access to the Content Companies' highly sensitive confidential information will inadvertently, and unavoidably, use that information to facilitate competitive decision-making. Nor will the threat of sanctions deter individuals who are non-lawyers and who have no regular business before the Commission. Moreover, even an intentional use of information contained in the Content Companies' Carriage Agreements and negotiation materials will be impossible to detect. The Orders do not explain how the Bureau will detect, investigate, and prosecute violations of the Orders, which will cause immediate irreparable harm to the Companies and the public interest.

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[56] *See, e.g.*, Acknowledgments on behalf of the ACA, MB Docket No. 14-57 (Posted Oct. 9, 2014).

[57] Order, ¶ 7.

It is notable that under the antitrust laws, sharing of the highly sensitive proprietary data contained in Carriage Agreements—as proposed in the Orders—would be impermissible if it were the result of a private agreement among competitors.[58] Yet that is precisely what the Orders propose to do here. The Orders create an environment where MVPDs, other content distributors, and the Content Companies' competitors will have access to pricing and other highly sensitive information.

In short, gaps in the Modified Joint Protective Orders increase the risk that misuse of the Content Companies' highly sensitive information will occur. Even if an individual violates—whether subliminally or purposefully—the Orders' prohibitions on competitive use of the information contained in Carriage Agreements, it would be virtually impossible for the Content Companies or the Commission to detect such violations. And once any anticompetitive use of such information occurs, the Commission could never undo the harm to the Content Companies' business and marketplace competition.

C. The Orders Fail To Provide Protections Courts Commonly Extend To Non-Parties' Confidential Information.

Federal courts carefully guard against forcing a non-party to disclose confidential information in analogous circumstances. Courts repeatedly have recognized that special protections are necessary when a non-party is asked to produce confidential commercial information because "[i]t would be divorced from reality to believe that [a litigation party] . . . would serve as the champion of its [non-party competitor] either to maintain the confidentiality

[58] *E.g.*, 15 U.S.C. § 1; *United States v. Container Corp. of Am.*, 393 U.S. 333, 337-38 (1969) (holding exchange of price information violated the Sherman Act); 13 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 2111c, 2111g(5) (3d ed. 2012) ("The basic concerns of any exchange of information among rivals are collusion or collusion-like behavior, and exclusion. . . . Ad hoc competitor-to-competitor 'exchange' of particularized price information, such as the price offered or made to a particular customer, should ordinarily be considered a naked or nearly naked restraint.").

designation or to limit public disclosure as much as possible. . . ."[59] These protections are especially important when a non-party's pricing information is at issue.[60]

Courts routinely recognize that requiring a non-party to disclose confidential documents—including those addressing price and other proprietary contractual terms—gives competitors an unfair advantage.[61] For these reasons, courts generally refuse to require a non-party to produce its confidential business information if the information could be viewed by or disclosed to a competitor,[62] or if the disclosure would otherwise damage a non-party's ability to compete in the marketplace.[63] Where produced among parties, courts generally protect pricing information, viewing it under seal—in other words, in a manner analogous to the treatment the Content Companies have requested. Because pricing information is so sensitive, courts generally will protect it from disclosure on a public docket. Moreover, because non-parties are essentially powerless to protect their interests when their confidential information has been produced, courts rarely conclude that their privacy interests can be safeguarded with a protective order.[64] Instead, even when confidential business information is relevant to an underlying dispute, courts

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[59] *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990).

[60] *See id.*; *cf. Fed. Trade Comm'n v. OSF Healthcare Sys.*, No. 11-50344, 2012 WL 1144620, at *8 (N.D. Ill. April 5, 2012) (recognizing that the manner in which a business prices its products and services is generally confidential).

[61] *See Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 548-49 (N.D. Ind. 1991) (declining to require production of all governing board minutes where likely to reveal confidential commercial information).

[62] *See Echostar Commc'ns Corp. v. The News Corp.*, 180 F.R.D. 391, 395 (D. Colo. 1998); *see also, e.g.*, *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987); *Education Logistics, Inc. v. Laidlaw Transit, Inc.*, 2011 WL 1348401, at *2 (N.D. Tex. April 8, 2011); *R & D Bus. Sys. v. Xerox Corp.*, 152 F.R.D. 195, 197 (D. Colo. 1993).

[63] *Echostar Commc'ns Corp.*, 180 F.R.D. at 395; *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 528-29 (D. Del. 2002).

[64] *See Education Logistics, Inc.*, 2011 WL 1348401, at *4.

nonetheless prohibit public access to the information if the potential harm of disclosure to a third party outweighs the benefit to the litigation.[65]

In marked contrast to the protection a court would provide if the Carriage Agreements were requested in litigation, the Orders require the automatic, public disclosure of pricing, other contractual terms, and related negotiation materials essential to ensuring that the Content Companies can compete fairly in the marketplace without adequately considering the potential resulting harm to the Content Companies and the public interest. The Content Companies have no advance notice of whether any of their highly sensitive confidential information will be produced to the Commission and no ability to determine whether it has been properly designated.

CONCLUSION

For all of the foregoing reasons, the Commission should require the Bureau to refrain from placing any Carriage Agreements and related materials in the record, and instruct the Bureau instead to review these materials *in camera* or at the Department of Justice. Alternatively, if any of the Content Companies' highly sensitive information is deemed necessary to include in the record, the Commission should require the Bureau to modify the Modified Joint Protective Orders to place only the most relevant information in the record, to redact and/or anonymize the most highly sensitive information to the maximum extent possible, and to implement the other protections suggested herein.

[65] *Id*.

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Dated: October 14, 2014.

CERTIFICATE OF SERVICE

I, Mace Rosenstein, hereby certify that on this 14th day of October, 2014, I caused true and correct copies of the foregoing Emergency Request for Stay of Media Bureau Order and Associated Modified Protective Orders to be served by Federal Express and electronic mail to the following:

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